SUPREME COURT, U.S.
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No. 91-1654

In the
Supreme Court of the United States
October Term, 1991

STARKEY LABORATORIES, INC.,
Petitioner,

v.

GN DANAVOX, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE MINNESOTA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent GN Danavox, Inc. states that it is an existing corporation incorporated under the laws of the State of Minnesota. The parent corporation of GN Danavox, Inc. is GN Danavox AS, a Danish corporation, whose parent corporation is GN Great Nordic Ltd., a Danish corporation. The non-wholly owned subsidiaries of these corporations are the following corporations:

Alkaline Batteries, Ltd., Hong Kong
Danish Polish Batteries, Poland
Comtext International, Ltd., United Kingdom
Otwidan ApS, Denmark
Intrason S.A., France
GN Danvox Xiamen Ltd., People's Republic of China
GN Con.Tec Teledata SpA, Italy
GN FileTech AS, Denmark
Dansk MobilTelefom I/S, Denmark
Danish Polish Telecommunications Group VS, Denmark
Stofa Invest ApS, Denmark

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STARKEY LABORATORIES, INC.,
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TO THE MINNESOTA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Minnesota Court of Appeals' opinion in this case.

THE OPINION BELOW

Petitioner seeks a writ of certiorari to review the judgment and opinion of the Minnesota Court of Appeals in *GN Danavox, Inc. v. Starkey Laboratories, Inc.,* 476 N.W.2d 172 (Minn. Ct.App. 1991), rev. denied, rehg. denied (1992).

STATUTORY PROVISIONS INVOLVED

1. Minn. Stat. §549.191 provides:

> Upon commencement of a civil action, the complaint must not seek punitive damages. After filing the suit a party may make a motion to amend the pleadings to claim punitive damages. The motion must allege the applicable legal basis under section 549.20 or other law for awarding punitive damages in the action and must be accompanied by one or more affidavits showing the factual basis for the claim. At the hearing on the motion, if the court finds prima facie evidence in support of the motion, the court shall grant the moving party permission to amend the pleadings to claim punitive damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.

2. Minn. Stat. §549.20 provides:

> **Subd. 1.** (a) Punitive damages shall be allowed in civil actions only upon clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.
>
> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
>
> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

* * *

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. Separate proceeding. In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. Judicial review. The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be

construed to restrict either court's authority to limit punitive damages.

STATEMENT OF THE CASE

B. THE ACTION BELOW.

1. The Complaint.

Danavox originally served Starkey with a summons and complaint dated August 3, 1987. In compliance with Minnesota law, Danavox did not include a claim for punitive damages.

Instead, as required by Minn. Stat. §549.191, Danavox brought a separate motion to add punitive damages to its complaint. The motion alleged the applicable legal basis for awarding punitive damages and was accompanied by supporting affidavits and a memorandum of law. A hearing was held with oral argument. The trial court, finding prima facie evidence in support of the motion, granted Danavox leave to amend to claim punitive damages on August 22, 1988.

2. The Trial.

This matter was tried before a jury from August 6 through August 23, 1990. At Starkey's request, the trial was bifurcated pursuant to Minn. Stat. §549.20, subd. 4. Accordingly, evidence of Starkey's financial condition and evidence which was relevant only to punitive damages was excluded from the liability and compensatory damages trial. Evidence of Starkey's financial condition was admitted only after the jury had awarded Danavox compensatory damages based upon its finding that Starkey had defamed Danavox by publishing a false advertising flyer to over 10,000 customers.

The jury received separate instructions and a separate special verdict form on the punitive damages claim after the conclusion of the second part of the bifurcated trial. The jury was instructed pursuant to Minn. Stat. §549.20. [App. A-11]. Starkey did not object to the instruction and

Danavox prevailed on the punitive damages claim.

In September of 1990, Danavox was heard on its motion for a premanent injunction. On September 19, 1990, the trial court, in its Order for Judgment on Special Verdict, made conclusions of law in accordance with the jury's verdict, awarded costs and attorneys' fees pursuant to Minn. Stat. §325D.44, subd. 1 (6) and (8) and 325D.45, subd. 2, and permanently enjoined Starkey from engaging in any further deceptive trade practices against Danavox [App. A-1].

Starkey moved for judgment notwithstanding the verdict or, in the alternative, remittitur or, in the alternative, a new trial on all issues submitted to the jury, for the first time arguing that Minn. Stat. §549.20 is unconstitutional. Starkey failed to move for post trial relief with regard to the trial court's imposition of a permanent injunction against Starkey. The trial court dismissed Starkey's post trial motions after specifically reviewing the jury's punitive damage award in light of the factors required of the jury and trial court in Minn. Stat. §549.20, subd. 3. [Appellant's App. A-1].

3. Starkey's Appeal.

Starkey failed to appeal the breach of contract claim, the deceptive trade practices claim, the trial court's imposition of attorney's fees and costs pursuant to the deceptive trade practices claim, the imposition of a permanent injunction, or whether any competent evidence existed to support the jury's verdicts.

Starkey appealed only an evidentiary issue and issues relating to the punitive damage award. At oral argument Starkey failed to raise any issues with regard to the punitive damage award.

Although Rule 24.04 of the Minnesota Rules of Civil Procedure requires that Starkey notify the Minnesota Attorney General of its consitutional challenge of Minn. Stat. §549.20, Starkey failed to do so until after the trial court denied Starkey's post trial motions.

REASONS FOR DENYING THE PETITION

I. INTRODUCTION AND SUMMARY OF THE ARGUMENT

A writ in this case is neither necessary nor warranted. There exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.1. Starkey's claim that a writ of certiorari is justified misconstrues this Court's holdings and attempts to create issues where none exist. Starkey's due process rights were vigorously guarded by the Minnesota courts and the protections inherent in Minnesota law.

The due process rights afforded Starkey under Minn. Stat. §549.191 and Minn. Stat. §549.20 are greater than those required by this Court under *Pacific Mutual Life Insurance Co. v. Haslip,* 111 S.Ct. 1032 (1991). The Alabama procedure approved in *Haslip* provided for the jury to be instructed that the imposition of punitive damages is not compulsory and the purpose of punitive damages is to punish and deter wrongful conduct. In the instant case, the Minnesota jury was similarly instructed, but was also required to consider the factors enumerated in Minn. Stat. §549.20. In addition, Minnesota imposes a clear and convincing evidence standard, a bifurcation of the punitive and compensatory issues, and de novo review by the trial court and appellate courts. Minnesota litigants, moreover, cannot allege a claim for punitive damages in initial pleadings but must move for an amendment to add that count while making a prima facie factual showing of deliberate disregard. The instant case involved Starkey's widespread and defamatory publication of a liquidation flyer against its competitor Danavox with the purposeful intent of driving Danavox out of business. The Minnesota procedures used in assessing and reviewing the jury's punitive damages award against Starkey imposed definite and meaningful constraints on the jury's discretion.

II. MINN. STAT. §549.20 IS CONSTITUTIONAL AND WAS APPLIED CORRECTLY BELOW BECAUSE IT ADEQUATELY PROTECTS A DEFENDANT'S RIGHT TO DUE PROCESS AS MANDATED BY THE *HASLIP* STANDARDS.

A. *Minnesota law provides adequate pretrial due process protection by prohibiting parties from alleging punitive damages without leave of court.*

Pursuant to Minn. Stat. §549.191, Minnesota litigants are not allowed to allege a claim for punitive damages in any pleading without seeking permission from the district court. The trial court may not allow the amendment if it determines the moving party's affidavits do not make a prima facie showing of deliberate disregard of the rights or safety of others by clear and convincing evidence. Minn. Stat. §549.191 protects litigants from the unnecessary costs of defending a marginal or frivolous claim for punitive damages.

Danavox brought a motion to amend its complaint to add a cause of action for punitive damages. After considering Danavox's affidavits and moving papers and after a hearing with oral argument, the trial court granted Danavox leave to so amend its complaint on August 18, 1988.

Such due process protections afforded litigants in Minnesota under Minn. Stat. §549.191 were not available to Pacific Mutual, the defendant in *Haslip*. In this respect, Minnesota provides more due process protection than required by the *Haslip* standards.

B. *Minnesota law provides adequate due process protection by allowing the punitive damage claim to be bifurcated.*

Minn. Stat. §549.20, subd. 4, provides that, if any party requests, the trial court shall bifurcate the compensatory and punitive portions of a trial. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in the

compensatory damages portion of the trial.

Before the trial began, Starkey requested that the court bifurcate the compensatory and punitive issues. The trial court granted Starkey's request. No evidence of Starkey's financial condition or other evidence relevant only to punitive damages was admitted into evidence during the compensatory damage stage of the trial. Only after the jury deliberated and determined that Starkey had defamed Danavox and awarded Danavox $517,752.00 in compensatory damages was the jury permitted to hear evidence of Starkey's wealth.

Bifurcation of compensatory and punitive issues was not available to Pacific Mutual in *Haslip.* In this respect as well, therefore, Minnesota law provides a higher degree of due process protection than the Alabama law affirmed in *Haslip.* Such additional safeguards to due process as the use of bifurcation were noted with approval by Justice O'Connor in her dissent in *Haslip,* on the basis that they "afford more meaningful guidance to juries, thereby lessening the chance of arbitrary and discriminatory awards . . . ." *Haslip,* 111 S.Ct. at 1064 (1991) (dissenting opinion).

C. *Minnesota law provides adequate due process protection by requiring the trial court to instruct the jury on numerous specific factors it is to consider.*

Minn. Stat. §549.20, subd. 3, requires that:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon

> discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Minnesota juries are also instructed that an award of punitive damages is discretionary, not mandatory. Accordingly, the *Danavox* jury was specifically instructed by the trial court that punitive damages are discretionary. The *Haslip* jury was also so instructed, pursuant to Alabama law. The *Danavox* jury was also instructed that the purpose of punitive damages is to "award the Plaintiff an amount which will serve to punish the defendant and deter others from commission of like acts." [App. A-11]. The *Haslip* jury was also so instructed. In addition to considering these purposes, the *Danavox* jury was instructed that to award Danavox punitive damages they had to find Starkey acted with deliberate disregard of Danavox's rights and they must also consider the following factors contained within Minn. Stat. §549.20, Subd. 3, in determining the amount of any award:

1. The seriousness of the hazard to the public arising from the Defendant's misconduct.
2. The profitability of the misconduct to the Defendant.
3. The duration of the hazard and its excessiveness;
4. The attitude and conduct of the Defendant upon discovery of the misconduct;

5. The number and level of employees involved in causing or concealing the misconduct;

6. The financial condition of the Defendant;

7. The total effect of other punishment likely to be imposed upon the Defendant as a result of the misconduct, including compensatory and punitive damages awards to the Plaintiffs and other similarly situated persons.

[App. A-11].

Starkey did not object to the trial court's instruction. At Starkey's specific request, the court also informed the jury of the possibility the court may grant Danavox attorneys' fees pursuant to the jury's prior finding of deceptive trade practices.

Obviously, Starkey's financial condition was only one among numerous factors to be considered by the jury. Minnesota law satisfies and exceeds the *Haslip* requirements in this respect as well.

D. *Minnesota law provides adequate due process protection by requiring a clear and convincing standing of proof.*

The *Haslip* jury was instructed on a mere preponderance of the evidence standard of proof. Minnesota juries, pursuant to Minn. Stat. §549.20, subd. 1(a), are instructed on a clear and convincing evidence standard of proof. This standard requires that the acts of the defendant show deliberate disregard for the rights or safety of others. Minn. Stat. §549.20, in subd. 1(b) specifically defines "deliberate disregard" as follows:

> (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

> (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
>
> (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

The Danavox jury was instructed they could award punitive damages if they found "by clear and convincing evidence that the acts of the defendant in defaming Plaintiff show a deliberate disregard for the rights of Plaintiff...." [App. A-11]. The trial court went on to define "clear and convincing" by instructing:

> When I say clear and convincing evidence, I mean that the evidence must lead you to conclude that it is highly probable that the defendant acted with deliberate disregard to the rights of Plaintiff.
>
> Put another way: The evidence must produce in your minds a firm belief or conviction that the defendant acted with deliberate disregard for the rights of others and specifically, for the rights of the plaintiff.

[App. A-11].

Haslip approved such a standard of evidence even though it found such a standard was not required to provide due process. 111 S.Ct. at 1046, n.11. The Minnesota law as applied in the instant case therefore provided Starkey greater due process protection than required by *Haslip*.

E. *Minnesota law provides adequate due process protection by requiring post trial review of all factors.*

The Alabama post-trial procedures affirmed by this Court require the trial court to review the jury's award and enumerate reasons for interfering with the verdict or

refusing to do so with regard to the size of the award. The Alabama Supreme Court also reviews the decision, thereby providing an additional check on the jury's discretion. The same procedural safeguards are found in the Minnesota post-trial review process.

The trial court in the instant case also specifically reviewed the award and made specific findings pursuant to Minn. Stat. §549.20, subd. 5, which provides:

> The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

On December 5, 1990, the trial court issued a memorandum opinion as part of its order denying Starkey's post-trial motions in which it reviewed the punitive damage award in light of the Minn. Stat. §549.20, subd. 3, factors. The Trial Court also made specific findings by adopting pages 22 through 27 of Plaintiff's Memorandum in Opposition to Defendant's Motion for Judgment Notwithstanding the Verdict, Remittitur, or New Trial. [Appellant's App. A-1]. Those factors were supported by the following facts: Starkey attempted but failed to purchase Danavox from its Danish parent company in the spring of 1987. After its purchase attempt was rebuffed, Starkey telemarketers falsely represented to mutual customers that Danovox was going out of business. In July of 1987 Starkey sold used Danavox hearing aids through a "Danavox Liquidation" flyer which was distributed to over ten thousand hearing aid dispensers. The flyer falsely represented that Danavox was liquidating. In addition, the flyer contained many other gross misrepresentations of fact. Starkey sold the Danavox hearing aids as new even though it knew and had acknowledged in writing that the hearing aids were used. [App. A-5].

The parties' mutual customers were deceived by the flyer. Starkey intended to deceive the customers in order to drive Danavox out of business. As a result, Danavox's reputation was damaged. [App. A-5].

Starkey's deceit damaged not only Danavox, but all of the customers and consumers who were deceived by its fraudulent flyer. [App. A-5].

The number of Starkey employees engaged in the misconduct extended from the President and throughout the Starkey organization. Starkey employees, including its President, William Austin, laughed throughout the trial, most notably during Danavox's final argument. Their derisive attitude toward Danavox could be noted throughout the courtroom by their laughter. [App. A-5].

No one in the Starkey organization thought there was anything wrong with sending out the Danavox Liquidation flyer. The Vice President of Operations and the President both testified they thought there was nothing wrong with the flyer even though it led customers to believe Danavox was going out of business. They even thought it would be acceptable to send out a second liquidation flyer. [App. A-5].

Starkey officers and managers were impeached at trial. Their testimony regarding whether anyone at Starkey ever took Danavox complaints seriously or ever investigated the complaints was contradictory. Finally, the evidence showed Starkey to be financially sound with a net profit of approximately $7,000,000 in three years. The punitive damage award would not bankrupt the company. [App. A-5].

After the trial court made the above findings, Starkey received another procedural due process check at the Minnesota Court of Appeals. The court of appeals reviewed the trial court's findings and found them to provide adequate support for the jury's verdict. Thus, once again, the Minnesota post-trial procedures applied in the instant case amply satisfy the *Haslip* due process standards by providing trial and appellate court review of a jury's punitive damage award in light of numerous

specific statutory factors with specific findings required to support the award.

III. CONSIDERATION OF STARKEY'S FINANCIAL CONDITION AS A FACTOR IN DETERMINING PUNITIVE DAMAGES BY CLEAR AND CONVINCING EVIDENCE IN A BIFURCATED TRIAL WITH DE NOVO JUDICIAL REVIEW IS CONSTITUTIONALLY PERMISSIBLE.

Starkey argues that the jury's consideration of its financial condition violated its due process rights and cites *Haslip* as its authority. The *Haslip* Court, however, never even considered the issue. In fact, *Haslip* specifically approved the Alabama Supreme Court's seven criteria for determining whether a punitive damage award is reasonably related to the goals of deterrence and retribution, criteria which *include* the financial position of the defendant. *Haslip* concluded that the application of these criteria "imposes a sufficiently definite and meaningful constraint on the discretion of the Alabama fact finder in awarding punitive damages." *Haslip,* 111 S.Ct. at 1045. As set forth above, at least seven similar criteria for Minnesota courts were applied in *Danavox,* of which the financial condition of the defendant was also only one of many factors. In this respect, this is all that *Haslip* requires: "the fact finder must be guided by more than the defendant's net worth." *Id. Accord., Oberg v. Honda Motor Co.,* 814 P.2d 517, 524 (Or. App. 1991).

Nor did the *Haslip* decision reverse this Court's earlier approval of the admissibility of a defendant's financial condition for purposes of determining what size punitive award would adequately punish and deter. Such approval of consideration of a defendant's financial condition was noted in *Newport v. Fact Concerts, Inc.* 453 U.S. 247 (1981), where the Court stated that "evidence of a tortfeasor's wealth is traditionally admissible as a measure of the amount of punitive damages that should be awarded . . . ." *Id.,* 453 U.S. at 270. In *Newport,* the Court

approved a fact finder's ability to assess punitive damages against offending public officials personally, *based on their individual financial resources. Id.,* 453 U.S. at 269. In order to determine a proper amount for a punitive damage award, it is obvious that a fact finder *must* have access to accurate financial information regarding the defendant. Otherwise, ignorant of the ability of the defendant to pay, fact finders may award damages in excess of the amount necessary to punish and deter, thereby offending due process just as much as if wealth were the *only* factor considered. *Mattison v. Dallas Carrier Corp.,* 947 F.2d 95 (4th Cir. 1991); *Adams v. Murakami,* 813 P.2d 1348 (Cal. 1991); and *Hospital Authority v. Jones,* 409 S.E.2d 501 (Ga. 1991).

In *Adams,* the California Supreme Court ruled that it is reversible error not to submit evidence of a defendant's wealth to the trier of fact. Dr. Murakami was sued by a former patient for medical malpractice, battery, the intentional infliction of emotional distress, and punitive damages. No evidence of Dr. Murakami's financial condition was submitted to the jury. The jury returned verdicts for the patient, including an award of $750,000.00 for punitive damages. Dr. Murakami appealed, alleging the punitive damage award was improper because the patient did not introduce evidence of Dr. Murakami's financial condition. The court of appeals affirmed but the Californa Supreme Court reversed. The California Supreme Court, relying on a previous decision, reasoned that the purpose of punitive damages, to deter future bad conduct, is not served if the

> wealth of the defendant allows him to absorb the award with little or no discomfort.... By the same token, of course, the function of punitive damages is not served by an award which, in light of the defendant's wealth and gravity of the particular act, exceeds the level necessary to properly punish and deter. (citation omitted).

Id., 813 P.2d at 1350.

The Court also observed that an appellate court has a difficult time determining without speculation whether an award is excessive unless the record contains evidence of the defendant's financial condition. Therefore, due process not only permits a fact finder's consideration of a defendant's financial condition, it requires it. The fact that such information was one of many factors considered by the *Danavox* jury only strengthened the due process protection afforded Starkey.

In the instant case, Starkey had the benefit of every conceivable due process protection: Danavox had to make a prima facie showing of deliberate disregard; Starkey received a bifurcated trial; the trial court instructed the jury on numerous specific factors the jury was to consider pursuant to Minn. Stat. §549.20; the trial court reviewed the jury's verdict as to each factor and made specific findings; and the appellate court also reviewed the verdict based on the factors mandated by Minn. Stat. §549.20.

To pass constitutional muster, *Haslip* requires reasonableness and adequate guidance from the court. These standards have been met and exceeded by the Minnesota statutory constraints in this case. Due process has been satisfied.

CONCLUSION

For the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

Dated: May 15, 1992

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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

Court File No. MX 87-18918

G. N. Danavox, Inc. a Minnesota corporation,	)	
Plaintiff,	)	
v.	)	**ORDER FOR JUDGMENT FOR SPECIAL VERDICT**
Starkey Laboratories, Inc., a Minnesota corporation,	)	
Defendant.	)	

The above-entitled action came on for trial by jury before the undersigned Judge of the District Court on August 6, 1990, at 9:00 A.M. in Courtroom 359C in the Hennepin County Government Center in the City of Minneapolis, County of Hennepin, State of Minnesota. Plaintiff G. N. Danavox, Inc. was represented by its attorney, Ms. Sandra Gilbert, Esq. Defendant Starkey Laboratories, Inc., was represented by its attorney, Mr. John Lunseth, Esq.

After plaintiff had completed its case and rested, the Court granted defendant's motion for a directed verdict in regard to plaintiff's claim for relief based upon the intereference by the defendant with present or prospective contractual relationships, trademark infringement by the defendant, and violation by defendant of the Consumer Fraud Act, Minn. Stat. 325F.68. The Court found, as a matter of law, that plaintiff had not presented any testimony that there had been any contract between plaintiff and a third party intentionally interfered with by

defendant or that plaintiff would have been able to procure business but for the interfence of defendant. The Court also found, as a matter of law, that a prima facie case of trademark infringement had not been made by plaintiff as a trademark law generally does not extend to the resale of goods under a true mark. The Court also found, as a matter of law, that the cause of action for violation of the Consumer Fraud Act, Minn. Stat. 325F.68 was not proved by the facts, as the misrepresentations by defendant were made to the dispensers of hearing aid products, not plaintiff.

Pursuant to Rule 49.01 of the Minnesota District Court Rules of Civil Procedure, written interrogatories were sumitted by the Court to the jury for findings as a special verdict. The Court, having duly considered the Special Interrogatories and the juror's answers thereto, the testimony and exhibits offered by the respective parties and from all of the files and records in this case, makes the following Conclusions of Law and Order for Judgment.

CONCLUSIONS OF LAW

1. That plaintiff G. N. Danavox, Inc. and defendant Starkey Laboratories, Inc. entered into a contract in June, 1987 in regard to the purchase of behind-the ear hearing aids by defendant from plaintiff.

2. That defendant Starkey Laboratories, Inc. breached the contract it had entered into with plaintiff G. N. Danavox, Inc. as to the purchase in June, 1987 of behind the ear hearing aids.

3. That plaintiff G. N. Danavox, Inc. sustained damages in the amount of $4,729.20 as a result of defendant Starkey Laboratories Inc.'s breach of said contract between the parties.

4. That defendant Starkey Laboratories, Inc. defamed plaintiff G. N. Danavox, Inc. by statements made in a written flyer mailed out by defendant to dispensers of hearing aid products in mid July, 1987.

5. That plaintiff G. N. Danavox, Inc. sustained

damages in the amount of $517,752.00 as a result of plaintiff's defamation by defendant Starkey Laboratories, Inc. in the written flyer mailed out by defendant to dispensers of hearing aid products in mid July, 1987.

6. That defendant Starkey Laboratories, Inc. engaged in deceptive trade practices in violation of Minn. Stat. 325D.44, Subd. 1 (6) and (8) when said defendant distributed the written flyer to dispensers of hearing aid products in mid July, 1987.

7. That plaintiff G. N. Danavox, Inc. is the prevailing party in regard to its deceptive trade practices action pursuant to Minn. Stat. 325D.44, Subd. 1 (6) and (8) and that defendant Starkey Laboratories, Inc. willfully engaged in the deceptive trade practices against plaintiff knowing the practices to be deceptive.

8. That the actions of defendant Starkey Laboratories, Inc. which constituted defamation toward plaintiff G. N. Danavox, Inc. showed a deliberate disregard for the rights of plaintiff.

9. That plaintiff G. N. Danavox, Inc. is awarded $1,500,000.00 as punitive damages against defendant Starkey Laboratories, Inc.

10. That plaintiff G. N. Danavox, Inc. incurred $31,846.00 as reasonable attorneys fees and $13,325.20 as reasonable costs in connection with the maintenance of its action against defendant Starkey Laboratories, Inc. for engaging in deceptive trade practices in violation of 325D.44, Subd. 1 (6) and (8) and is entitled to an award of these costs and attorneys fees pursuant to Minn. Stat. 325D.45, Subd. 2.

ORDER FOR JUDGMENT

1. That defendant Starkey Laboratories, Inc. is hereby permanently enjoined from engaging in any further deceptive trade practices against plaintiff G. N. Danavox, Inc. including specifically the representation that the hearing aids purchased from G. N. Danavox in June, 1987 are new hearing aids and any disparagement of the goods

or business of G. N. Danavox by false or misleading representation of fact.

2. That judgment is granted to plaintiff G. N. Danavox, Inc. against defendant Starkey Laboratories, Inc. in the amount of $2,022,481.20, together with plaintiff's reasonable attorneys fees of $31,846.00 and reasonable costs of $13,325.20 pursuant to Minn. Stat. 325D.45, Subd. 2, and together with plaintiff's costs and disbursements herein and together with interest on the amount of $522,481.20 from August 3, 1987 to the date of this Order.

Judgment is stayed for 30 days from the date of this Order.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: September 19, 1990

BY THE COURT:

_____

Daniel R. Hart, Judge

Case Type: Other Civil

STATE OF MINNESOTA — DISTRICT COURT

COUNTY OF HENNEPIN — FOURTH JUDICIAL DISTRICT

Court File No. MX 87-18918

GN Danavox, Inc. a Minnesota corporation, Plaintiff, v. Starkey Laboratories, Inc., a Minnesota corporation, Defendant.	**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT, REMITTITUR, OR NEW TRIAL**

TO: Defendant Starkey Laboratories, Inc. and its attorney, John B. Lunseth, II, Esq., Rider, Bennett, Egan & Arundel, 2000 Lincoln Centre, 333 South Seventh Street, Minneapolis, Minnesota 55402.

PROCEDURAL STATEMENT

Defendant has moved the Court for judgment notwithstanding the verdict, remittitur, or a new trial. This Memorandum opposes Defendant's Motion and supplements the entire file in the case and oral argument of Counsel to be made at the hearing on the Motion.

FACTS

This matter arose in 1987 when Defendant engaged in a course of conduct calculated to drive Plaintiff out of business. In the spring of 1987, Defendant attempted to purchase Plaintiff from its parent company. That attempt failed. Shortly thereafter,

* * *

parties, and circumstances of the trial, and in his discretion reduce the verdict if its amount is unsupported." *Sandt v. Hylen,* 224 N.W.2d 342, 343 (Minn. 1984), *Jangula v. Kloseck,* 170 N.W 2d 587, 594 (Minn. 1969). Furthermore, "a district court should grant remittitur only when the verdict is not the result of passion and prejudice, yet it is so grossly excessive as to shock the court's conscience. *Kociemba v. G.D. Searle & Co.,* 707 F.Supp. 1517, 1536 (D. Minn. 1989). In deciding whether to reduce damages, the trial court must leave the plaintiff with the highest dollar verdict permissible under the evidence. *NewMaster v. Mahmood,* 361 N.W.2d 130,133 (Minn. App. 1985).

In addition to the above standards of review, Minn. Stat. §549.20 Subd. 5 requires that the trial court review an award for punitive damages in light of the factors contained in Minn. Stat. §549.20 Subd. 3. That section provides:

> Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including the compensatory and punitive damage awards to the plaintiff and other similarly situtated persons, the severity of any criminal penalty to which the defendant may be subject."

In light of all applicable standards of review, the defendant's motion for judgment notwithstanding the verdict, remittitur or new trial must be denied.

The $1.5 million in punitive damages awarded by the jury is clearly supported by the evidence. The evidence establishes that Starkey attempted to purchase Danavox in the spring of 1987. When that attempt failed, Starkey's telemarketers falsely represented that Danavox was going out of business.

In July of 1987, Starkey sold used Danavox hearing instruments through a brochure it designed and distributed to over ten thousand hearing aid dispensers. The brochure falsely stated Danavox was liquidating. In addition, the brochure purported to sell large quantities of new Danavox hearing instruments which Starkey claimed to have received directly from Denmark. The evidence at trial demonstrated the fraudulent nature of the brochure. Danavox was not in the process, nor was it ever contemplating, liquidation. In addition, Starkey did not receive large quantities of hearing instruments, nor did such instruments come directly from Denmark. Lastly, the hearing instruments and/or parts sold through the brochure were not new.

The evidence admitted at trial proved that Starkey knew the brochure was false in all regards. The evidence also shows that numerous Danavox customers and hearing aid dispensers were deceived by the brochure. The evidence further establishes that even after Starkey stopped representing that the Danavox hearing instruments were used, it continued to mislead the dispensers and the public by informing them that Danavox hearing instruments sold through the brochure were reconditioned.

In the winter of 1987-1988, and up to the time of trial, Starkey continued to make false and defamatory representations regarding Danavox by telling its customers that Danavox hearing aids could no longer be repaired.

There were no mistaken inferences drawn from the liquidation brochure produced by Starkey. The evidence is clear that Starkey intended to drive Danavox out of business and at the same time deceive hearing aid

dispensers and the consuming public. In no way can it be argued that Starkey's actions were an isolated incident. Starkey's actions evidence a pattern of misconduct over the course of three years in which it deceived the public and injured the reputation of Danavox.

It cannot be said that this situation is purely an economic business dispute. Rather, this is an attempt by the world's largest hearing aid manufacturer to drive its smaller competitor out of the market. The impact of Starkey's conduct cannot be measured by focusing solely on Danavox. Starkey's conduct deceived thousands of hearing aid dispensers some of whom, as result, deceived the consuming public. This is not merely a dispute between two competing companies, but rather a situation where the actions of Starkey have damaged the entire hearing aid market.

In light of the factors contained in Minn. Stat. §549.20 Subd. 3, the punitive damage award should not be reduced. Starkey's actions created a serious hazard to the public. Starkey deceived consumers regarding the status of Danavox and the condition of the Danavox hearing instruments sold through the brochure. In addition, Starkey damaged the reputation of Danavox and attempted to drive its competitor out of the market. Deceiving the consuming public, in and of itself, constitutes a serious public hazard. When such conduct also forces businesses out of the market thereby reducing competition, the level of harm to the public significantly increases.

The evidence establishes that Starkey's attempts to drive Danavox out of business conduct lasted from the spring of 1987 to the time of trial. In addition, the evidence indicates that Starkey was fully aware that the liquidation brochure was false and misleading and was created with the intent to drive Danavox out of the market for its own benefit and to the detriment of the consumer. The number of employees engaged in the misconduct extended to all levels of the company. The misconduct originated with the President. The attitude of the Starkey employees after

discovering the misconduct also supported the jury's punitive damage award. Starkey employees including its President were laughing throughout the trial, most markedly during Plaintiff's final argument. Their laughter and derisive attitude could be noted by everyone in the courtroom. In addition, Starkey employees threatened to send out another brochure and continued to represent that Danavox hearing aids could not be repaired. Starkey's Vice President of Operations and President both testified they thought there was nothing wrong with the flyer even though it led customers to believe Danavox was going out of business. They thought there was nothing wrong with sending out a second Liquidation Brochure. In addition, it was evident at trial that Starkey conducted no investigation to even make a determination if its employees were making false statements about Danavox. While President William Austin testified that Richard Baran and Steven Chargo conducted such investigations, those managers denied even hearing about Danvox's complaints and stated unequivocally they conducted no investigation. Faced with serious charges from its competitor, Starkey chose to ignore the complaints and continue on its course of deceit. Finally, the evidence establishes that Starkey is financially sound. Starkey had a net profit of approximately $7,000,000.00, after income taxes, over the last three years. Therefore, it cannot be said that the punitive damage award will drain the life blood out of the company.

The jury's punitive damage award represents an amount necessary to deter Starkey from engaging in this type of malicious conduct in the future. The evidence shows that Starkey's President, William Austin, has but one goal: to sell all of the hearing aids in the world, and will stop at nothing until this goal is obtained. Starkey has had three years to the time of trial to investigate Danvox's concerns and make changes in the way it does business. Instead, it chose to continue its harmful way of doing business. It is exactly this type of malicious indifference to the rights of others that must be deterred before it results in further

damage to other hearing aid manufacturers, dispensers, and consumers.

It is not enough that Starkey has been enjoined from engaging in defamatory conduct against Danavox. The purpose of punitive damages is to punish a party for past conduct and to deter the Defendant and others from similar conduct. *Johnson v. Ramsey County,* 424 N.W.2d 800, 806, 807 (Minn. App. 1988), *In Re Miera,* 104 B.R. 150, 160 (Bkrtcy. D. Minn. 1989). The injunction does not punish Starkey for its past conduct. In addition, the injunction does not prevent Starkey from engaging in this type of misconduct against other hearing aid companies, nor does it act to deter others from acting in such a deliberate and malicious way towards their competitors. Starkey has shown itself to be oblivious to Danavox's rights even at trial. Obviously, the only thing that motivates Starkey is its pocketbook. Perhaps if Starkey sees that its deceit costs it money, it will start to change its ways. Therefore, to effectively punish Starkey and deter it and others from engaging in similar conduct in the future, the jury's punitive damage award must be upheld.

Based on the specific standard of review for punitive damages and the general standards courts must follow in deciding motions for judgment notwithstanding the verdict, remittitur or new trial, the evidence clearly supports the jury's punitive damage award and Starkey's motion must be denied.

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

GN Danavox, Inc.,
a Minnesota corporation,

Plaintiff,

vs.

Starkey Laboratories, Inc.
a Minnesota corporation,
Defendant.

FILE NO. 87-018918
Appellate Court No.

TRANSCRIPT OF PROCEEDINGS

VOLUME XI

The above-entitled matter came on for hearing before the Honorable Daniel R. Hart, one of the Judges of the above-named court, with a jury present, commencing on the 22nd and 23rd days of August 1990, in Courtroom 359-C Hennepin County Government Center, Minneapolis, Minnesota.

APPEARANCES:

SANDRA GILBERT, ESQUIRE, and JOHN KOSANDA, ESQUIRE, appeared as Counsel for and on behalf of the Plaintiff.

JOHN B. LUNSETH, II, ESQUIRE, and WILLIAM J. EGAN, ESQUIRE, appeared as Counsel for and on behalf of the Defendant.

Reporter: Robert C. Flanders.

* * *

THE COURT: Now, members of the jury, you'll recall that before I sent you in to deliberate in regard to the verdict that you've already returned to the Court, I read to

you some rather lengthy instructions. I'm going to send those instructions back into the jury room with you when you commence your deliberation in regard to the issue that's presently before you and they remain relevant for the purposes that I explained to you earlier, but I'm not going to reread all of those instructions to you at this time.

I will be sending you in to deliberate in regard to the remaining issue and in regard to those deliberations there will be a special verdict form for you to fill in the answers to two questions on. And I'm going to read you the instructions that relevant to that special verdict form.

The first question of the special verdict you'll be asked to answer is "1. Did the actions of Defendant Starkey Laboratories, Inc., which constituted defamation Plaintiff, GN Danavox, Inc., show a deliberate disregard for the rights of Plaintiff?"

The second question of the special verdict that you'll be asked to answer is "2. If your answer to question 1 is yes, then answer this question: What is the amount of money if any, which you feel should be awarded to Plaintiff, GN Danavox, Inc. as punitive damages?"

In the previous special verdict you returned to the Court, you found that Defendant defamed Plaintiff. In regard to these findings, punitive damages may be awarded if you also find as follows: If you find by clear and convincing evidence that the acts of the Defendant in defaming Plaintiff shows a deliberate disregard for the rights of Plaintiff, then you may, in addition to other damages to which you find Plaintiff entitled, award the Plaintiff an amount which will serve to punish the Defendant and deter others from commission of like acts.

When I say clear and convincing evidence, I mean that the evidence must lead you to conclude that it is highly probable that the Defendant acted with deliberate disregard to the rights of Plaintiff.

Put another way: The evidence must produce in your minds a firm belief or conviction that the Defendant acted with deliberate disregard for the rights of others and specifically, for the rights of the Plaintiffs.

A Defendant has acted with deliberate disregard of the rights of others if the Defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights of others, and 1. deliberate proceeds to act in conscience or intentional disregard of the high degree of probability to the injury of the rights of others, or 2. deliberately proceeds to act with indifference to high probability of injury to the rights of others.

If you determine that punitive damages should be awarded, you should consider factors relating to the purpose of punitive damages. In determining the amount, including, but not limited to the following factors:

1. The seriousness of the hazard to the public arising from the Defendant's misconduct;
2. The profitability of the misconduct to the Defendant;
3. The duration of the hazard and its excessiveness;
4. The attitude and conduct of the Defendant upon discovery of the misconduct;
5. The number and level of employees involved in causing or concealing the misconduct;
6. The financial condition of the Defendant;
7. The total effect of other punishment likely to be imposed upon the Defendant as a result of the misconduct, including compensatory and punitive damages awards to the Plaintiffs and other similarly situated persons.

In this regard the Court, on the basis of your prior finding that Defendant has engaged in deceptive trade practices, may decide to grant Plaintiff an award against Defendant of reasonable attorney's fees which the Plaintiff has incurred in connection with this litigation. If such an award is made, the amount of the reasonable attorney's fees would be in the discretion of the Court.

You may award punitive damages against an employer because of an act done by an employee only if you find that:

A. The employer authorized the doing and the manner of that act or;

B. The employee was unfit and the employer

deliberately disregarded a high probability that the employee was unfit, or;

C. The employee was employed in a managerial capacity with authority to establish policy and make planning level decisions for the employer and was acting in the scope of that employment, or,

D. The employer or a managerial act of the employee described in Clause C ratified or approved the act while knowing of its character and probable consequences.

It is always a matter of discretion with the jury as to whether punitive damages should be awarded. If they are awarded, they must be in a reasonable amount, taking into consideration the factors that I have just enumerated to you.